

(26,901)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 815.

THE COMMERCIAL CABLE COMPANY, APPELLANT,

*vs.*

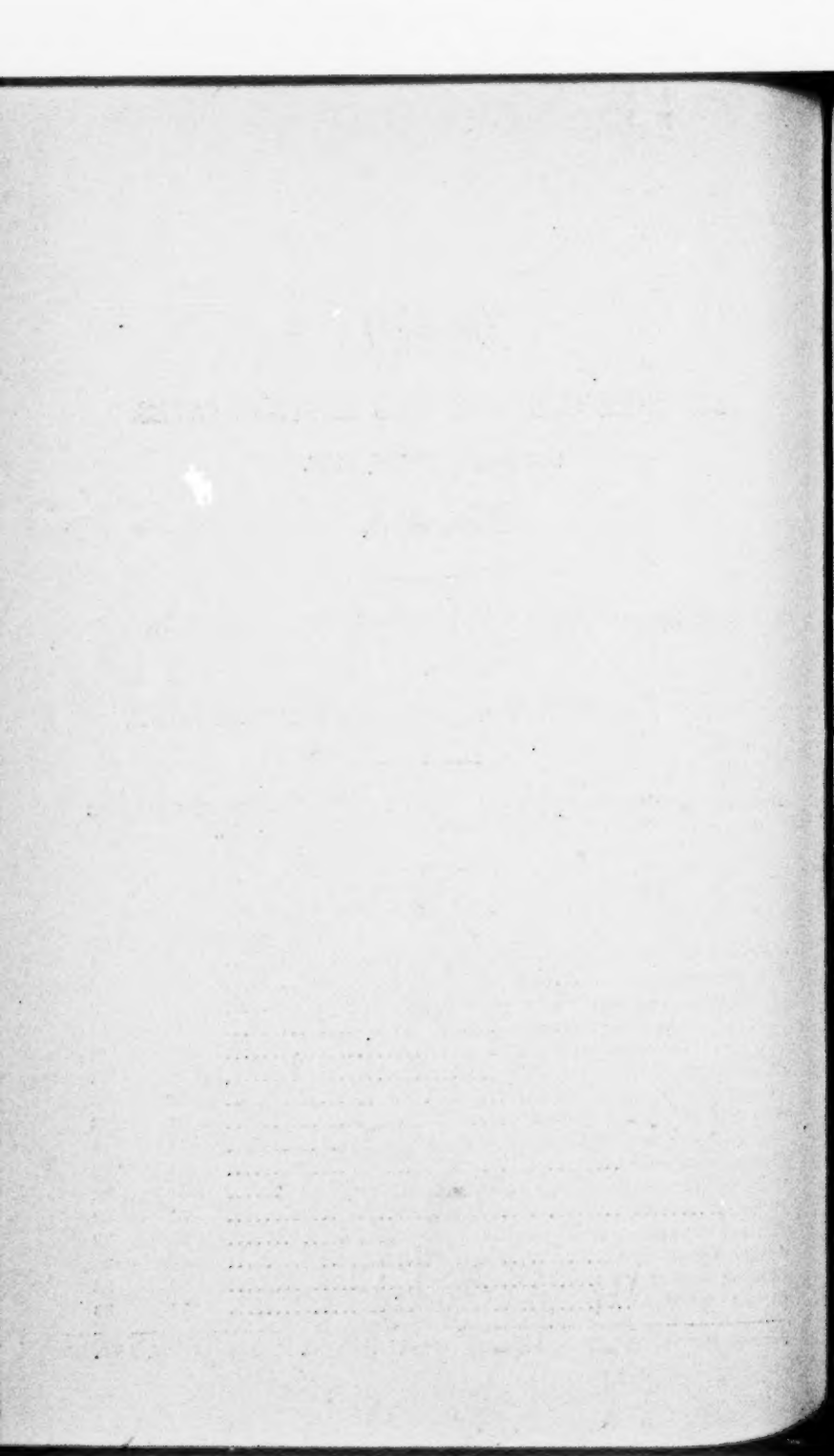
ALBERT S. BURLESON AND NEWCOMB CARLTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

4

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1

*Equity Subpœna.*

The President of the United States of America to Albert S. Burleson,  
Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Commercial Cable Company, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 4th day of December, in the year one thousand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR., *Clerk.*

WILLIAM W. COOK,  
*Plaintiff's Solr.*

The defendant is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR., *Clerk.*

2 I hereby certify, that after due and diligent search I am unable to find the within named Albert S. Burleson in the Southern District of New York.

Dated New York, Dec. 5, 1918.

THOMAS D. MCCARTHY,  
*U. S. Marshal, So. Dist. N. Y.*

U. S. District Court, S. D. of N. Y., Filed Dec. 6, 1918.

I hereby certify that after due and diligent search I am unable to find the within named Albert S. Burleson in the Southern District of New York.

Dated New York, Dec. 9, 1918.

THOMAS D. MCCARTHY,  
*U. S. Marshal, So. Dist. N. Y.*

3 In the District Court of the United States, Southern District  
of New York.

THE COMMERCIAL CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON, Defendant.

*Bill of Complaint.*

To the Judges of the District Court of the United States, Southern  
District of New York:

The Commercial Cable Company, a citizen and resident  
of the City, County and State of New York, brings this, its bill  
complaint, against Albert S. Burleson, a citizen of the State of Texas  
and a resident of the District of Columbia.

And thereupon your orator complains and says: That during  
the times hereinafter mentioned it has been and still is a corporation  
duly organized under the laws of the State of New York and has  
principal place of business in the City of New York, in the Southern  
District of New York, and is a resident therein, and is engaged among  
other things in the ownership, maintenance and operation of a system

4 of submarine cables in the Atlantic Ocean extending from the  
United States of America to Canada, Newfoundland, Azores  
Islands, United Kingdom, and France. That said system  
includes cables from New York City in New York State at  
Rockport, near the City of Boston, Massachusetts, to Canso, Nova  
Scotia, Canada, and St. Johns, Newfoundland, and also includes  
submarine cables from Canso, Nova Scotia, to the Azores Islands, and  
from the Azores Islands to Ireland, United Kingdom, and also  
cables from Canso, Nova Scotia, to Ireland, United Kingdom, and  
also includes cables from Newfoundland to Ireland, United Kingdom,  
and a cable from Ireland, United Kingdom, to Havre, in the Repu-  
blic of France. And cables from Ireland, United Kingdom, to Weymouth  
Super Mare, England. And a cable from New York to Cuba.  
That for over thirty years last past your orator has been and still  
operating its system of submarine cables in the Atlantic Ocean for  
the transmission of cablegrams, and that the same constitutes inter-  
state and international commerce, and your orator further says that  
it also transmits messages for the Government of the United States  
one-half of the regular public rate therefor, although under no legal  
obligation so to do, this being the practice and custom in the opera-  
tion of cables generally.

That on or about the 16th day of July, 1918, the Congress of the  
United States by Joint Resolution of the Senate and House of Repre-  
sentatives passed a resolution authorizing and empowering the  
President during the continuance of the present war whenever he  
should deem it necessary for the national security or defense to  
supervise or take possession and assume control of telegraph, and



phone, marine cable or radio system or systems or any part thereof and operate the same for the duration of the war but not beyond the date of the proclamation by the President of the United States of the exchange of ratifications of the Treaty of Peace. That a copy of the  
5      aforesaid Joint Resolution of the Congress, is attached hereto and made a part hereof and marked Exhibit "A."

That on or about the 11th day of November, 1918, an armistice was signed suspending hostilities of the present war, and thereupon immediately the duration of the war ceased within the letter, purpose and spirit of said Joint Resolution, so far as said Joint Resolution purported to authorize the taking of possession and control of the systems therein described. That on November 11, 1918, the President officially addressed the two Houses of the Congress in joint session, and formally and officially announced the termination of the war. That in such address the President, after stating the terms of the armistice, said:

"The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it."

That the defendant is, and during all the times hereinafter mentioned has been Postmaster-General of the United States. That on or about the 16th day of November, 1918, the defendant, assuming to act as Postmaster-General, announced informally through the public press that he had taken possession and assumed control of all marine cable system or systems owned or operated by any and all American corporations, including not only your orator's cables hereinbefore specified, but also including the cable of the Commercial Pacific Cable Company from San Francisco to China, Japan and the Philippine Islands, and also including the two cables of the Central and South American Telegraph Company from New York City to and through the Isthmus of Panama and thence down the western coast of South America and across the mountains to the Argentine Republic, and including also six British owned cables leased to the Western Union Telegraph Company, and two American owned cables  
6      leased to that company, and including also cables from the United States to Cuba and from the United States to Mexico.

That his action was based on a proclamation of the President of the United States dated November 2nd, 1918, (the actual date of execution being unknown to your orator, but your orator alleges upon information and belief that it was subsequent to November 11th, 1918,) a copy of which is attached hereto and made a part hereof and marked Exhibit "B." That on or about the 16th day of November defendant issued an order, without date, assuming to take control of said cable system, a copy of which is attached hereto and is made a part hereof and is marked Exhibit "C." That the defendant claims to have taken possession and assumed control of your orator's aforesaid cable system and to be now operating the same, and claims to be entitled to the income of your orator's said cable system, which is more than ten thousand dollars a day.

That the said seizure or attempted seizure of your orator's said cable system is unconstitutional, unauthorized, ultra vires, illegal and void,

for the reasons that the war within the meaning of said Resolution had terminated prior to the time of said seizure and the alleged authorization thereof; that the Congress had no power or authority under the Constitution to authorize the taking possession and control and operation of said cable system under the circumstances existing at the time of said seizure; and that said seizure was not reasonably necessary for the national security or defense; and that said seizure deprived your orator of its property without due process of law; and that said seizure took your orator's private property for public use without just compensation to your orator; and that said seizure was an unreasonable and arbitrary seizure; and that said seizure was not for public use; and that defendant is not an impartial tribunal to determine your orator's compensation for the use of said marine cables; and that proper and legal provision has not been made for the payment to your orator of said compensation, not even for the keeping by your orator of the regular profits of its own property;

7 and finally that the purpose, plan and effect of said seizure to unite, consolidate and unify your orator's said cable system with that of your orator's competitor, the Western Union Telegraph Company, is in violation of the Anti-Trust Act of Congress of July 2, 1890, both in its immediate effect of suppressing competition now existing and in its effect in disorganizing your orator's organization, plant and equipment, so as to disqualify your orator from taking up and resuming such competition, when said cable system is returned to your orator on the signing of a treaty of peace and the proclamation thereof.

That the recent war referred to in said joint resolution, is no longer in continuance, it having been terminated beyond possibility of renewal on November 11, 1918, by an armistice. That said Proclamation dated November 2nd, 1918, did not become a proclamation and was not proclaimed or announced, signed, countersigned, made public or effective until after November 11th, 1918, namely, about November 16th, 1918, and that no seizure or possession of said cables was attempted, claimed or made until on or about November 16th, 1918.

That it is not necessary for the national security or defense that your orator's system of marine cables shall be seized, or taken possession of, or assumed control of by the defendant or anyone else. That the national security or defense will not be furthered in the slightest degree by defendant taking possession and assuming control of your orator's marine cables. That the national security or defense was fully attained by the signing of said armistice and by the discontinuance of hostilities under the said present war. That a full, adequate, complete, quick and correct cable service has been during the period of the war and still is being given by your orator on its cable system to the Government of the United States and that all government messages are given precedence over all other messages, and that there has been no complaint or occasion for complaint on the

8 part of the Government in regard to the quick and accurate transmission of its messages, and that your orator's cables are worked and operated to their utmost capacity by a most com-

petent staff of officers and cable operators, and that said service could not be increased or bettered, and that the operation of said cable lines by or under the control of the defendant would be less efficient and satisfactory not only to the Government in the transmission of its cablegrams, but to the public in the transmission of public messages generally and that the seizure of said cables on the ground that they were or are necessary for the national security or defence was and is a mere pretext without substance or basis of fact whatsoever.

That ever since the United States entered the present war the American ends of said marine cables of your orator have been and still are under the absolute control of the officials of the United States Government and particularly the control of the Director of Naval Communications, and that nothing has been done by your orator relative to the operation of said cable lines without the knowledge and approval of said Director of Naval Communications. That every request and even suggestion made at any time by said Director of Naval Communications or his representatives, who was stationed and established in your orator's cable office in New York City, has been promptly complied with and carried out in every particular. That a most rigid censorship was established by the United States Government over your orator's cables, and that your orator has heartily co-operated in said censorship. That all the demands and even requests of the Government on your orator in behalf of the national security and defense have been promptly fully and cheerfully complied with by your orator, notably a request on October 29th, 1918, by the State Department of the Government at Washington that your orator place at the disposal of that Department and the President a special cable across the Atlantic so that there might be instantaneous communication between the Government at Washington and its American representatives at Paris. That thereupon your orator promptly set aside one of its Trans-Atlantic cables for that purpose and furnished a through circuit from Washington to Paris which has ever since been at the disposal of the State Department of the Government.

That the transmission of cablegrams for the next few months between America and Europe did not and does not necessitate or justify the seizing of the ten thousand miles of cable from San Francisco to China, Japan, and the Philippines (as has been done); nor the seizing of two cables from New York to Panama, thence down the west coast of South America, thence over the mountains to the Argentine Republic (as has been done); nor the seizing of cables to Cuba and Mexico (as has been done); nor the seizing of thirteen cables across the Atlantic (as has been done). That all of said thirteen cables have been and are devoted first to the transmission of government messages, relative to peace negotiations or any other government business, and then press messages and commercial messages; that the seizing of said thirteen cables by the Government does not facilitate or better in the slightest degree the transmission of government peace messages or any other messages, and has not except in one instance for a short time when the influenza raged, which, however, did not affect the service on Government messages, said

cables being already worked to their utmost capacity by most expert operators and staff, and that both cable companies, having cables in the Atlantic Ocean, have been and are working their cables first for the Government as fully and efficiently as they possibly could be worked, if actually owned and operated by the Government itself for Governmental purposes. That one of said thirteen cables has heretofore been set aside by your orator for the use of the Government, as hereinbefore alleged, and others would have been so set aside also if any request so to do had been made. That your orator was not consulted as to the necessity or even advisability of said seizure of said

10      cables, although your orator could have given more competent expert advice on that subject than anyone else conversant with cable affairs.

That said joint resolution of Congress and all acts of defendant thereunder are unconstitutional, illegal and void, in that the compensation therein provided for is not to be determined by an impartial jury or commission, but under the authority given to the President is intended to be, and will be, determined by the defendant and that the authority conferred upon the President under said Resolution is exercised and will be exercised through the defendant. That in the case of the Postal Telegraph-Cable Company the system of which was heretofore seized under said Resolution, the fixing of the compensation therefor was committed to the defendant; that the determination of your orator's compensation will thus be left to the arbitrary caprice and prejudiced mind of defendant, who is interested personally and officially in giving an unfair and unreasonably low, insufficient and inadequate compensation to your orator, because the less he gives your orator the more he keeps for the Government to its profit at your orator's expense and to the personal renown of defendant. That for many years last past the defendant as Postmaster-General has advocated government ownership of telegraphs and cables and that defendant is not an impartial tribunal to determine the compensation, operation, competition and policy of complainant in regard to its said system of marine cables.

That your orator's right to appeal to the Court of Claims is an illusory right, in that no provision has been made for paying any judgment that your orator may obtain in that court. That no adequate or safe fund has been provided from which your orator may at some future time be compensated for the seizure and use of its said submarine cables, and that the only recourse for your orator to collect any judgment given by the Court of Claims will be an application to the Congress to appropriate the money therefor, which application may be disregarded absolutely, and thereupon

11      your orator would receive no compensation whatsoever. That the seizure of your orator's marine cables is not the seizure merely of physical property or of the use thereof exclusively for governmental purposes as distinguished from commercial purposes, but is a seizure of the same with all future income therefrom so long as the seizure continues, thereby seizing the monies, income and profits of your orator in addition to the physical property itself, and thereby depriving your orator of such monies, income and profits

and jeopardizing your orator's payment of interest and dividends in case the defendant should exercise his discretion to withhold the same as he has power under said Joint Resolution so to do, and that your orator's only recourse to repossess and obtain such monies, income and profits would be a suit in the Court of Claims without any certainty or reasonable expectation that a judgment therefor would be paid within a certain time, if, in fact, paid at all, and that this constitutes an unreasonable seizure, and the taking of private property for public use without just compensation, and deprives your orator of its property without due process of law, in violation of the Constitution of the United States. That there is no compulsory process by which a judgment of the Court of Claims can be collected and that it is entirely voluntary with the Congress whether any such judgment shall be paid or not, and that one of the component parts of your orator's system, namely, the Commercial Pacific Cable Company on September 21st, 1907, had one of its cables disrupted by one of the warships of the United States and presented a claim for damages in the Court of Claims and obtained a judgment June 2nd, 1913, for \$35,894.47, subsequently reduced to \$35,838.22 and that although the Congress has been repeatedly requested to pay said claim it never has done so and the same is still unpaid and there are no means of enforcing payment. That defendant claims that he is entitled to take all of your orator's

12 daily profits and return a small portion thereof to your orator and keep the remainder in violation of the decisions of the Supreme Court of the United States and of the Constitution of the United States. That this is confiscatory, communistic and in violation of established principles of law. That recently the Postal Telegraph system, with which your orator connects and is intimately associated, had its land telegraph lines seized by defendant and although that system in the year 1917 made a profit of \$4,269,547.61, the defendant awarded that system only \$1,680,000 as compensation, being 6% on \$28,000,000, which defendant's committee said was the physical value of the system's plant. That defendant through a committee proceeds on a fundamentally wrong principle in determining compensation, namely, 6% on an arbitrarily fixed physical value of the plant without any allowance for earning power and without any correct method even of arriving at said appraised value. That all this is the taking of property without due process of law and without proper compensation being made or provided for. That the power to fix the compensation to be paid your orator has been illegally delegated.

That defendant proposes and intends to so intermingle, unite, consolidate and merge your orator's business, good will, staff, organization, employees, plants and equipment with that of said Western Union Telegraph Company that the separate identity, business and good will of your orator will disappear, so that your orator may be forced or persuaded to abandon competition hereafter, and acquiesce in defendant's plans for government ownership of the same, or an amalgamation of all cables in the Atlantic Ocean. That defendant has called in as assistant and adviser Theodore N. Vail,



President of the American Telephone and Telegraph Company, to work out a plan for a "universal wire service" including all wire communications of the United States, namely, cables, telegraph lines and telephone lines. That all this is and would be in violation of

13 The Anti-Trust Act of Congress of July 2, 1890, which applies in full force to defendant as well as your orator, now that the war has terminated.

That your orator's said marine cables are private property and have been taken by defendant not for public use, and that this is in violation of the Constitution of the United States and that there is no necessity for the exercise of the power of the Government in taking the said marine cables, and that no provision has been made for any judicial inquiry as to the necessity for the seizure and taking of said marine cables, and that said seizure is arbitrary, all in violation of the Constitution of the United States, guaranteeing due process of law. That this suit in equity is brought to enforce a claim to real or personal property within the Southern District of New York.

That the continued interference of the defendant with the business of your orator as aforesaid is causing and likely to cause great money damage to your orator which will largely exceed the sum of three thousand dollars exclusive of interest and costs.

That the defendant in carrying out his unlawful possession and control of your orator's marine cable system and business will use the military power of the United States, against which as a matter of course your orator has no adequate means of resistance, and that great and irreparable injury is being done to your orator, its property and business, and the cable communication of the public.

Wherefore your orator prays that the defendant, his officers and agents, may answer the premises according to law, (answer under oath being hereby waived), and that he may, by a writ of injunction to be issued out of and under the seal of this Honorable Court, be enjoined from carrying out his claim that he has taken possession and assumed control of your orator's said marine cable system, and that the defendant, his officers and agents, may be enjoined from interfering with your orator's property or business aforesaid or

14 from taking any steps or making any demands on your orator in connection therewith.

And your orator prays that pending the determination of this suit, this Court will grant and issue a temporary injunction or restraining order, forbidding all of said actions on the part of the defendant as to which a final injunction as hereinbefore prayed, in order to preserve your orator from great injury to its business and to prevent the injury that would occur to the public interest by reason of the threatened acts aforesaid while this suit is pending.

And your orator further prays that it may have such other and further relief in the premises as the nature of the circumstances of the cause may require and to your Honors may seem meet.

Your orator prays that process of subpoena against the defendant, may be issued out of and under the seal of this Honorable Court, commanding him, to appear and make answer, plead or demur to

your orator's bill of complaint at a day to be named therein and under certain penalty to be therein expressed.

WILLIAM W. COOK,  
*Solicitor of Complainant.*

CHARLES E. HUGHES,  
*Of Counsel with Complainant.*

15 STATE OF NEW YORK,  
*City and County of New York, ss:*

Clarence H. Mackay, being duly sworn, deposes and says: That he is the President of the Commercial Cable Company, the complainant in the above entitled suit in equity; That he has read the foregoing Bill of Complaint; that the statements contained therein are true to the best of his knowledge and belief and so far as made of his own knowledge they are true and so far as they are made from information derived from others he believes them to be true.

CLARENCE H. MACKAY.

Subscribed and sworn to before me this fourth day of December, 1918.

[L. S.]

THOMAS G. BARKER,  
*Notary Public, Kings County, No. 419.*

Certificate filed in N. Y. Co. No. 529.  
My commission expires March 20, 1919.

16 EXHIBIT A.

[Public Resolution—No. 38—65th Congress.]

[H. J. Res. 309.]

Joint Resolution To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of

the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in  
17 this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

Approved, July 16, 1918.

18

#### EXHIBIT B.

By the President of the United States of America.

#### *A Proclamation.*

Whereas, the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President, during the continuance of the present war, is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per cent. of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per cent., will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code: Provided further, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the several States in relation to



taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

19 And whereas, it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all marine cable systems and to operate the same in such manner as may be needful or desirable.

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States or any State thereof, including all equipment thereof and appurtenances thereto, whatsoever, and all material and supplies.

It is hereby directed that the supervision, possession, control and operation of such marine cable systems hereby by me undertaken shall be exercised by and through the Postmaster-General, Albert S. Burleson. Said Postmaster-General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, board of directors, receivers, officers and employees, of said marine cable systems.

Until and except so far as said Postmaster-General shall from time to time, by general or special orders otherwise provide, the owners, managers, board of directors, receivers, officers, and employees of the various marine cable systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be.

Regular dividends hitherto declared and maturing, interest upon bonds, debentures, and other obligations, may be paid in due course, and such regular dividends and interest may continue to be paid until and unless the said Postmaster-General shall from time  
20 to time otherwise by general or special orders determine; and, subject to the approval of said Postmaster-General, the various marine cable systems may determine upon and arrange for the renewal and extension of maturing obligations.

From and after 12 o'clock midnight on the 2d day of November, 1918, all marine cable systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster-General without further act or notice.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President in the District of Columbia, this 2d day of November, in the year of our Lord one thousand nine hundred and

eighteen and of the independence of the United States the one hundred and forty-third.

[SEAL.]

WOODROW WILSON.

By the President:

ROBERT LANSING,  
*Secretary of State.*

21

EXHIBIT C.

*Bulletin No. 14.*

Order No. 2351.

Pursuant to the proclamation by the President of the United States dated the second day of November, nineteen hundred and eighteen, I have assumed possession, control and supervision of the marine cable systems of the United States. This proclamation has already been published and the officers and operating officials of the cable companies are acquainted with its terms.

Until further notice the marine cable companies shall continue in operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. The officers, operators and employees of the marine cable companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public.

I earnestly request the loyal cooperation of all officers, operators and employees and the public, in order that the service rendered shall not only be maintained at a high standard, but improve where possible. It is the purpose to coordinate and unify these services so that they may be operated as a national system with due regard to the interests of the public and the owners of the properties.

No changes will be made until after the most careful consideration of all the facts. When deemed advisable to make changes, an announcement will be made.

Nothing contained in this order shall be construed to affect in any way the censorship of marine cables now conducted under the direction of the Secretary of the Navy under Executive Order of September 26, 1918.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed December 1918.

22 In the District Court of the United States, Southern  
District of New York.

THE COMMERCIAL CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

*Amendment of Bill of Complaint.*

To the Judges of the District Court of the United States, Southern  
District of New York:

Comes now the complainant above named and amends its Bill of Complaint by adding the said Newcomb Carlton as a defendant thereto and wherever in the body of the Bill the word "defendant" occurs there shall be added thereto in each instance the word "Burleson."

At the end of the allegation terminating at the beginning of fol.  
31 the following allegation is added:

That all of said cable systems, including your orator's, have landings on the territories of foreign nations, and upon information and belief that the consent of said nations to the United States Government seizing said system of cables, including said landings, has not been obtained, and that this constitutes a violation of the principle of international law that one nation shall not encroach upon or seize any part of the territory of another nation, and that all nations are very properly jealous of landings on their soil of cables controlled or owned by other nations and forbid it because it is liable to lead to international complications, and that even if the defendant should hereafter obtain the consent of said foreign nations to the seizure of said cables and landings on terms and conditions satisfactory to them, such terms and conditions, pertaining as they would to the occupation by the Government of foreign territory, would constitute the substance of a treaty which under the

23 Constitution of the United States can be made only by and with the advice and consent of the Senate, which advice and consent has not been obtained, and that this is a violation of the Constitution of the United States. That all this jeopardizes your orator's cables, cable landings and relations with foreign governments, the disruption of which would work irreparable injury to your orator.

Immediately before the prayer for relief insert the following allegation:

That the above named defendant Newcomb Carlton represents said defendant Burleson, and as such representative on the 13th day of December, 1918, made a personal demand upon your orator that your orator turn over to him, said defendant Newcomb Carlton, the possession and control of your orator's said cable lines, and that thereupon your orator being unable to resist the force which

the defendants had it in their power to use, was obliged to and did turn over to defendants under protest and without waiving any legal rights or objections thereto said cable lines.

That a copy of the order of the defendant Burleson, authorizing said seizure by the defendant Carlton is attached hereto and marked Exhibit "D" and is hereby made a part hereof.

That defendant Burleson and defendant Carlton are and each of them is illegally withholding your orator's property from your orator's possession and lawful control, and that said defendants are and each of them is in illegal possession of the same to the irreparable injury of your orator and are refusing to recognize your orator's right to the possession and enjoyment thereof. That the defendant Carlton has accepted, adopted and become a party to and participant in all of the unconstitutional unauthorized, ultra vires, legal and void acts aforesaid of the defendant Burleson and is accountable and responsible therefor, and threatens and intends to carry out the same and is now proceeding to carry out the same to the irreparable injury of your orator. That this suit is of a civil nature in equity and arises under the Constitution or laws of the United States.

That the prayer for relief is as follows (in lieu of the prayer it appears in the Bill) :

Wherefore, your orator prays that the defendant Burleson, his officers and agents, and the defendant Carlton, may answer the premises according to law (answer under oath being hereby waived) and that they may, by a writ of injunction to be issued out of and under the seal of this Honorable Court, be enjoined from carrying out their claim that they have legally taken possession and assumed

control of your orator's said marine cable system, and that  
 24 the defendant Burleson, his officers and agents, and the defendant Carlton, may be enjoined from interfering with your orator's property or business aforesaid or from taking any steps or making any demands on your orator in connection therewith, and that the defendants by mandatory injunction be required to return to your orator the possession and control of said cable lines, property and business so far as they have seized the same.

And your Orator prays that pending the determination of this suit, this Court will grant and issue a temporary injunction or restraining order, forbidding all of said actions on the part of the defendants as to which a final injunction is hereinbefore prayed, in order to preserve your orator from great injury to its business and to prevent the injury that would occur to the public interest by reason of the threatened acts aforesaid while this suit is pending.

And your orator further prays that it may have such other and further relief in the premises as the nature of the circumstances of the cause may require and to your Honors may seem meet.

Your orator prays that process of subpoena against the defendants, may be issued out of and under the seal of this Honorable Court, commanding them to appear and make answer, plead or

mur to your orator's bill of complaint at a day to be named therein and under certain penalty to be therein expressed.

WILLIAM W. COOK,  
*Solicitor of Complainant.*

CHARLES E. HUGHES,  
*Of Counsel with Complainant.*

STATE OF NEW YORK,  
*City and County of New York, ss:*

Clarence H. Mackay, being duly sworn, deposes and says: That he is the President of The Commercial Cable Company, the complainant in the above entitled suit in equity; that he has read the foregoing amendments to the Bill of Complaint; that the  
25 statements contained therein are true to the best of his knowledge and belief and so far as made of his own knowledge they are true and so far as they are made from information derived from others he believes them to be true.

CLARENCE H. MACKAY.

Subscribed and sworn to before me this 16th day of December, 1918.

[L. s.]

THOMAS G. BARKER,  
*Notary Public, Kings County, No. 419.*

Certificate filed in N. Y. Co. No. 529.

My commission expires March 30, 1919.

26

EXHIBIT "D."

Order No. 2474.

December 12, 1918.

Whereas the Congress of the United States in the exercise of the Constitutional authority vested in them, by Joint Resolution of the Senate and House of Representatives bearing date of July 16, 1918, resolved: that the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise, take possession, and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation of the exchange of ratification of the treaty of peace, and

Whereas the President of the United States, by his proclamation of the 2nd day of November, 1918, declared that he deemed it necessary for the national security and defense to supervise and take possession and assume control of all marine cable systems and to operate the same in such manner as may be needful or desirable, and did, by said proclamation under and by virtue of the powers vested in him by said

resolution and by virtue of all other powers thereto him enabling take possession and assume control and supervision of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing

27 under the laws of the United States or any State thereof, including all equipment and appurtenances thereto whatsoever and all the material and supplies, and did also by said proclamation direct that such supervision, possession, control and operation of said marine cable systems by him undertaken be exercised by and through the Postmaster General, Albert S. Burleson, which said proclamation further directed that until and except so far as the Postmaster General shall from time to time by general or special order otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various marine cable systems shall continue the operation thereof in the usual and ordinary course of business of said systems in the names of their respective companies, associations, organizations, owners or managers, as the case may be, and that from and after 12:00 o'clock midnight on the 2nd day of November 1918, all of the marine cable systems included in said proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice;

And whereas by Order No. 2351 of the Postmaster General, dated November 18, 1918, it was directed that all of the officers, operators and employees of the marine cable companies continue in the performance of their existing duties, reporting to the same officers as theretofore, and on the same terms of employment, in which order it was announced to be the purpose to co-ordinate and unify these services so that they might be operated as a national system with due regard to the interests of the public and the owners of the properties;

28 And whereas by letter of the Postmaster General, dated December 4, 1918, addressed to Mr. Clarence H. Mackay, President of the Commercial Cable Company, copies of which were transmitted to Mr. George G. Ward, Vice President of the Commercial Cable Company, and to Mr. Newcomb Carlton, President of the Western Union Telegraph Company, it was declared that the interest of the public service during the present emergency necessitated the unification in operation to the fullest extent possible of the cable system leading from this country to Europe so that the full capacity of all the cables might be available to the public and the press which it was manifest could only be accomplished through the operation of the two systems under one management, and that after having made a survey of the situation and becoming satisfied that the object sought could best be accomplished by placing the cables under the operating head of the Commercial Cable Company, it was directed that Mr. George G. Ward, Vice President of the Commercial Cable Company, assume the management and operation of both the Commercial Cable System and the cable systems operated by the Western Union Telegraph Company;

And whereas in his letter of December 6, 1918, said Newcomb Carlton not only acquiesced for his companies in the aforesaid direction



for unification in operation of the two cable systems under said George G. Ward, the operating head of the Commercial Cable Company, but pledged his hearty co-operation therein, stating his judgment to be that such unification would result in an increase in the total daily capacity of the cables comprising the two systems, and also in important economies in operation;

29 And whereas in his letter of December 11, 1918, Mr. Clarence H. Mackay, President of the Commercial Cable Company, advised the Postmaster General that said George G. Ward has taken no step to unify the properties by taking possession of the cables controlled by the Western Union Telegraph Company, and has no intention of doing so;

And whereas in his said letter of December 11, 1918, the said Clarence H. Mackay, President of the Commercial Cable Company, has shown the hostility of the officials of the said company to any plan of unification of operation of the cable systems, and said Ward has declined to comply with said instructions of the Postmaster General of December 4, 1918, and

Whereas, the public interests require that the operation of the said cable systems be unified not only for improvement of service but also that important economies in operation may be effected during the period of Government control which can be accomplished only by placing such unified operations under the management of persons in complete accord with the ends desired,

Now, therefore, it is ordered and directed that so much of the said Order No. 2351 as directs all of the officers, operators and employees of the marine cable companies to continue in the performance of their present duties, is modified so as to exclude Clarence H. Mackay, George G. Ward and William W. Cook from any connection with the supervision, possession, control or operation of any and all marine cable systems or any part thereof the supervision, possession,

30 control and operation of which was taken over and assumed by the President in his said proclamation of November 2, 1918, and said Newcomb Carlton is hereby directed to assume the management and operation of each and all of the marine cable systems, the supervision, possession, control and operation of which was taken over and assumed by the President and by him directed to be exercised by and through the Postmaster General so far and to such extent as is authorized by the said Joint Resolution of Congress and the said proclamation of the President. The said Carlton will proceed at once to the execution of this Order and shall carry into effect directions which have been given for the unification of the operation of said cable systems and such other directions hereafter to be issued.

(Signed)

[SEAL.]

A. S. BURLESON,  
Postmaster General.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 16, 1918.

31

*Equity Subpœna.*

The President of the United States of America to Newcomb Carlton,  
Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer an amended bill of complaint exhibited against you and Albert S. Burlison in the said Court in a suit in Equity, by The Commercial Cable Company and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 16th day of December, in the year one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR., *Clerk.*

WILLIAM W. COOK,  
*Plaintiff's Solr.*

The defendant is required to file an answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR., *Clerk.*

32 I hereby certify, That on the 16th day of December, 1918, at the City of New York, in my District, I personally served the within Subpœna in Equity upon the within-named Defendant Newcomb Carlton, at No. 195 Broadway, New York City, N. Y., by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

THOMAS D. MCCARTHY,  
*United States Marshal, Southern District of New York.*

Dated December 17th, 1918.

U. S. District Court, S. D. of N. Y. Filed Dec. 17, 1918.



33 United States District Court, Southern District of New York.

In Equity.

Docket No. E 15/330.

THE COMMERCIAL CABLE COMPANY, Complainant,

vs.

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

SIR: you will please take notice that the undersigned will bring the annexed motion on for hearing at a stated term of this Court for the hearing of motions appointed to be held at the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 27th day of December, 1918, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel may be heard.

Dated, New York, December 21st, 1918.

Yours, etc.,

FRANCIS G. CAFFEY,  
*United States Attorney,  
Solicitor for the Defendants.*

Office & P. O. Address, U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

To William W. Cook, Esq., 44 Wall Street, Solicitor for the Complainant.

34 In the District Court of the United States, Southern District of New York.

In Equity.

Docket No. E 15/330.

THE COMMERCIAL CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

*Motion to Dismiss.*

The Postmaster General, named as defendant in the above entitled case but not served with process therein, and the defendant Newcomb Carlton protest that the District Court of the United States for the Southern District of New York has no jurisdiction to entertain this bill of complaint as amended and without waiving this objection, but now and at all times hereafter insisting thereon, move that the bill of complaint as amended, and divers parts thereof, be dismissed, and assign the following grounds for this motion, namely:

First. The possession taken through the Postmaster General and the defendant Carlton of the complainant's property on the allegations of the bill of complaint as amended has been taken by the President, in the exercise of his executive discretion, pursuant to a resolution passed by the Congress in the exercise of its discretion, as possession by the United States and not by the defendants as individuals, and the possession and rights involved are exclusively those of the

35 United States and of the President in the exercise of his executive duties as such, and the District Court of the United States for the Southern District of New York has no jurisdiction to entertain this bill as amended, to which neither the United States nor the President is or can be made a party.

Second. The facts alleged in the bill of complaint as amended are insufficient to constitute a valid cause of action in equity.

Third. The war existing on July 16th, 1918, still continues and there has been no proclamation of the exchange of ratifications of the treaty of peace, and of these facts the Court should take judicial notice to negative the allegation of the bill of complaint that the war ceased on November 11th, 1918, and this allegation should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Fourth. The proclamation by and under which the possession alleged was taken, was signed by the President on November 2nd, 1918, and the proclamation by the President that it was done on November 2nd, 1918, signed by the President and attested by the Secretary of State, is conclusive that it was done on that day, and this Court should take judicial notice that it was signed on November 2nd, 1918, to negative the allegation of the bill of complaint that it was not signed until after November 11th, 1918, and this allegation should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Fifth. The Congress has authorized the President to take over the complainant's cables and the President in his discretion has exercised judgment that the taking over of such cables is necessary for the national security and defense, and this judgment is conclusive, and the proclamation of the President that it is deemed necessary  
36 for the national security and defense to take these cables is conclusive to negative the allegations of the bill of complaint to the contrary, and these allegations should be stricken out and dismissed from the bill as manifestly unfounded and impertinent.

Sixth. The resolution of the Congress and the proclamation of the President provide in terms for just compensation to the complainant to be determined by the President, and the allegations concerning the partial, arbitrary, capricious and prejudiced character of the Postmaster General do not affect the validity of the possession taken or the relief prayed for, and are manifestly unfounded and should be stricken out and dismissed from the bill as impertinent and scandalous.

Seventh. The allegation in the bill of complaint that the complainant's compensation "is intended to be, and will be, determined by the defendant (Burleson) and that the authority conferred upon the President under said Resolution, is exercised and will be exercised

through the defendant" is not a sufficient allegation of any fact and does not set forth whose intention is meant to be alleged and is immaterial to the validity of the possession taken and the relief prayed for and should be stricken out and dismissed from the bill as insufficient and impertinent.

Eighth. The allegations concerning the Postal Telegraph Cable Company have no bearing on any facts concerning the complainant or the relief prayed for, and should be stricken out and dismissed from the bill as impertinent.

Ninth. The allegations concerning the economic views of the Postmaster General, namely, that he has advocated Government  
37 ownership of telegraphs and cables, should be stricken out and dismissed from the bill as impertinent.

Tenth. The allegation "that the operation of said cable lines by or under the control of the defendant would be less efficient and satisfactory not only to the Government in the transmission of its cablegrams, but to the public in the transmission of public messages" is an allegation of the complainant's opinion, immaterial in view of the judgment reached by the President and the action taken by him, and should be stricken out and dismissed from the bill as impertinent.

Eleventh. The allegation "that the seizure of said cables on the ground that they were or are necessary for the national security or defence was and is a mere pretext without substance or basis of fact whatsoever" is an allegation of the complainant's opinion, immaterial in view of the judgment of the President and the action taken by him, and if intended as an allegation of bad faith on the part of the President is insufficient and should be stricken out and dismissed from the bill as insufficient, impertinent and scandalous.

Twelfth. The allegation "that the transmission of cablegrams for the next few months between America and Europe did not and does not necessitate or justify the seizing of the ten thousand miles of cable from San Francisco," etc., is an allegation of the complainant's opinion, immaterial in view of the judgment of the President and his action taken thereon, and should be stricken out and dismissed from the bill as impertinent.

Thirteenth. The allegation of the bill of complaint that the complainant is not provided with just compensation for the taking  
38 over complained of is manifestly unfounded in that Congress has in the resolution alleged expressly provided that the complainant shall receive just compensation and has provided for the executive and judicial determination thereof with recourse to the Courts in the normal and reasonable manner for the ascertainment of compensation in the case of takings by the United States, and this Court has judicial notice that Congress uniformly appropriates monies for the payment of all judgments rendered by the Court of Claims, and the allegations that the right of application to that Court is an illusory right and that there is no reasonable expectation of the timely payment of such a judgment are allegations that the United States and Congress will exercise bad faith, whereas this Court has judicial notice that the United States and Congress are

incapable of bad faith, and the allegations of the bill of complaint to the contrary are manifestly unfounded and should be stricken out and dismissed from the bill as impertinent and scandalous.

Fourteenth. The allegations concerning the injury to the Commercial Pacific Cable Company's cable on September 21, 1907, and the proceedings resultant thereon disclose that the claim was one for damages sounding in tort, and therefore one of which the Court of Claims had no jurisdiction to hear and determine judicially and in respect to which said Court had no power to enter a judgment, and this Court has judicial notice that no such judgment as alleged was or could be rendered, and said allegations have no bearing upon the validity of the possession complained of, and the relief sought, and said allegations should be stricken out and dismissed from the bill as impertinent and scandalous.

39 Fifteenth. The allegations concerning the compensation awarded to the Postal Telegraph system are immaterial to the possession complained of and the relief sought, and should be stricken out and dismissed from the bill as impertinent.

Sixteenth. The allegations concerning the method to be pursued in ascertaining compensation to the complainant bear only upon the complainant's right, if any, to have some other method of compensation pursued, and not upon the validity of the possession complained of or the relief sought, and should be stricken out and dismissed from the bill as impertinent.

Seventeenth. The allegations concerning the purposes and intent of the defendant Burleson as to the method of operating the complainant's cable lines, and the validity thereof under the Anti-Trust Act, do not sufficiently allege any proposed unlawful act, and do not affect the validity of the possession taken or the relief sought, and these allegations should be stricken out and dismissed from the bill as insufficient and impertinent.

Eighteenth. The allegations concerning the landings of the complainant's cables on territories of foreign nations and the complications likely to arise from the action of the Government are insufficient to state any cause of action or any part of a cause of action and have no relation to the validity of the possession taken from the complainant, or to the relief sought in the bill of complaint, and said allegations should be stricken out and dismissed from the bill as insufficient and impertinent.

Wherefore, the defendants say that they should not be held to answer to the bill of complaint as amended, or to the several allegations thereof above referred to, but that said bill of complaint as amended shall be dismissed and said several allegations should be stricken therefrom, with costs to the defendants.

40 Dated December 21, 1918.

FRANCIS G. CAFFEY,  
*United States Attorney for the Southern District  
of New York, Solicitor for the Defendants.*

EDWARD F. McCLENNEN,  
*Special Assistant to the Attorney General,  
Counsel for Defendants.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 21, 1918.

1 United States District Court, Southern District of New York.

THE COMMERCIAL CABLE COMPANY

against

ALBERT S. BURLESON and NEWCOMB CARLTON.

THE COMMERCIAL PACIFIC CABLE COMPANY

against

ALBERT S. BURLESON and NEWCOMB CARLTON.

These cases arise on motions to dismiss two bills in equity, for lack of jurisdiction and for want of equity, and they therefore present cases based altogether upon the allegations contained in them. Each bill was similar and the consideration of one may be taken as applicable to both. They prayed an injunction against the defendants from interfering with the plaintiff's property or business of which they had claimed to take possession.

The Commercial Cable Company's bill alleges that it was a corporation of the State of New York doing business in the City of New York and engaged in the operation of a system of submarine cables in the Atlantic Ocean to Canada, Newfoundland, The Azores, United Kingdom and France. That on the sixteenth of July, 1918, the Congress of the United States by Joint Resolution authorized the President during the continuation of the present war, whenever it should deem it necessary for the national security and defense, to take possession of any marine cable and operate the same for the duration of the war and not beyond the date of the proclamation by

2 the President of the exchange of the ratifications of the treaty of peace. That on the eleventh day of November, 1918, an armistice was signed suspending hostilities during the present war, and immediately thereafter the duration of the war within the purpose of the resolution terminated. That on the sixteenth of November, 1918, the defendant Burleson, assuming to act under a proclamation of the President, took possession of the plaintiff's cables and also of the cables of the Commercial Pacific Cable Company, the other plaintiff, from San Francisco to China, Japan and the Philippines and to South America from the City of New York. That the proclamation of the President, on which the defendant Burleson acted, was dated November second, 1918, a copy of which was annexed, and asserted that the President deemed it necessary for the national security and defense to take possession of all marine cable systems in the country.

That the seizure was illegal and void because the war had terminated within the meaning of the Resolution, because Congress had no power to authorize possession to be taken under the circumstances existing at that time, because it was not necessary for the national

security and defense to deprive the plaintiff of its property without due process of law and without compensation, because it was not for any public use and because the defendant Burleson was not an impartial tribunal to determine the plaintiff's compensation for the use of the cables. That proper and legal provision had not been made for the plaintiff's compensation, and that the purpose was to consolidate the plaintiff's system with that of its competitor, The Western Union Telegraph Company, in violation of the Anti-Trust Act of Congress and to suppress competition between the two.

That full, adequate, complete, quick and correct cable service had been given by the plaintiff throughout the period of the war  
43 to the government, whose messages had taken precedence over all others. That there had been no complaint on the part of the government nor was there any occasion therefor in the quick and accurate transmission of its messages. That the plaintiff's cables had been worked to their utmost capacity by a competent staff of officers and operators; that the service could not be increased and bettered; that the operation of the cable lines under the control of the defendant Burleson would be less efficient and satisfactory to the government and the public, and that the ground given for the seizure was a mere pretext without substance or basis.

That the cables had theretofore been under the absolute control of officials of the United States and that nothing had been done by the plaintiff in their operation without the knowledge and approval of the Director of Naval Communications, whose every request and suggestion had been complied with by the plaintiff in every particular; that the plaintiff had co-operated in a most rigid censorship which was established by the government and had met all demands and requests of the government fully and completely; that the transmission of cablegrams between America and Europe did not necessitate or justify the seizure of ten thousand miles of cable between San Francisco, China, Japan and the Philippines, or the seizing of the cables from New York to South America, nor of those to Cuba and Mexico, nor the seizing of thirteen cables across the Atlantic. That the seizing of such thirteen cables did not facilitate in the slightest degree the transmission of government messages; that they had been already worked to their utmost capacity as fully and efficiently as they could be worked if operated by the government.

44 That the Joint Resolution of Congress was unconstitutional in that compensation was not provided before an impartial jury or commission; that the defendant Burleson was an improper and unfair tribunal to make a provisional estimate of the plaintiff's damages; that the appeal to the Court of Claims was illusory because no provision was made for paying any judgment that the plaintiff might obtain; that there was no compulsory process by which a judgment of the Court of Claims could be collected, and that it was entirely voluntary with Congress whether such judgment should be paid or not.

That the defendant Burleson intended to consolidate the plaintiff's business with that of the Western Union Telegraph Company so that



its separate identity and business would disappear and the plaintiff would be forced to abandon competition thereafter and acquiesce in the defendant Burleson's plans for government ownership of the same: all in violation of the Sherman Act.

The Joint Resolution under which the President acted contained a provision that just compensation should be made for possession of any cable seized, in an amount to be determined by the President and if the amount so determined was unsatisfactory the person interested might receive seventy-five per cent of the amount so determined and should be entitled to recover such further sum as might be awarded in accordance with Section 24, Paragraph 20 and Section 45 of the Judicial Code. The first of these provisions authorized suits to be brought in the District Court, and the second a suit to be brought in the Court of Claims upon claims of similar character.

By amendment to the bills the name of the defendant Carlton was added wherever the defendant Burleson's name appeared and an allegation was also added that the landings of some of the cables were in foreign countries and seizure of them by the United States would constitute a violation of international law, of which all nations were properly jealous. That if such seizure was obtained by consent the consent would constitute in substance a treaty which could only be made with the concurrence of the Senate, whose consent had not been obtained.

There was also coupled with the motions, motions to strike out certain parts of the bill as irrelevant, impertinent and scandalous, but in view of the disposition made of the case these motions need not be set forth.

Edward F. McLennan, Harold Harper and Charles N. Bracelin for the motions.

Charles E. Hughes and William W. Cook opposed.

LEARNED HAND, *D. J.*:

I shall dispose of this case upon the merits and without considering two questions raised which go to the jurisdiction of the court. The first is that the bills pray for injunction against the United States, the second, that they are in effect directed against the President. The second question involves this; whether a court should pass a decree which directly contradicts an order made by the President but which must necessarily be enforced only through sanctions dependent upon his execution of the writ. As the merits of the case involve questions of importance, it appears to me more desirable to base my decision upon them, only premising that the preliminary objections pass without deciding. The theory of the bills is two-fold, first that the seizure of the cable lines on November sixteenth, 1918, was not justified by the Joint Resolution of July sixteenth, 1918; second, that the Resolution itself was an insufficient warrant, though its terms had been followed. I shall consider these in their order.

The Joint Resolution authorized the President to seize any cables

when he deemed it "necessary for the national security and defense" and the bills insist that the issue is justiciable in this court whether there was any such necessity. The scope of the court's inquiry need not concern me for, if no inquiry whatever is possible, its scope is irrelevant. The plaintiffs assume under the rule in such cases. *Field v. Clark*, 143 U. S. 649, *American School of Magnetic Healing v. McNulty*, 187 U. S. 94, *Buttfield v. Stranahan*, 192 U. S. 47, *Union Bridge Co. v. U. S.* 204 U. S. 364, *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, *Geglow v. U. S.*, 239 U. S. 1, that the grant given by the resolution of Congress is in effect limited by its right to delegate general legislative power. If so, they say, it can be extended only so far as to depute to an official, whether or not he be the President, the duty of ascertaining a fact or some fact which Congress has made a condition upon the incidence of the legislative act. Moreover, since that incidence is dependent upon the actual exercise of some intelligible decision upon the fact confided to the public official, his decision is reviewable to this extent, that there must be a tenable basis in the evidence from which a reasonable man could have reached the same conclusion. Thus it becomes justiciable though to a limited degree.

If it be admitted that the Joint Resolution falls within this class, might still be contended that under the latitude extended to the rule in cases like *Buttfield v. Stranahan* supra, and *Union Bridge Co. v. U. S.*, supra, the question of fact entrusted to the President could be considered to involve all those matters of public policy which make up the national security and defense. In those cases it was held proper for Congress to depute to officials the power to establish standards or forms of conduct to which the public must conform. This was certainly a very different duty from ascertaining whether a fact defined in general language had occurred. Even so, the decision would be justiciable and it would become necessary to consider the allegations in the bills, but I do not rely upon any such extension of the rule, because the Joint Resolution does not fall into the class of legislation which those cases control. It was not a rule for the future conduct of individuals, like most legislation; it was the sovereign act of condemning the temporary possession of private property for public use, rather administrative than legislative in its nature as those terms are generally used, though it must of course proceed from Congress. As such the question is whether the use to which the property was condemned was a public use within the accepted rules, and how that use should be defined.

I may assume for the moment that the use intended was to place the property at the general disposal of the President in the discharge of some of his constitutional functions without inquiry as to the specific purposes which he might have in mind. It is true that Congress might, if it chose, have required the President to state the occasion which he thought made his possession necessary and the uses to which he would put it, but that is not the point. If he had asked of Congress the immediate possession of the cables, would that have been lawful for them to consent to that possession without reserve or question? Had he been a private person, this clearly would



not be the case; some public use must have been disclosed and the possession dedicated to it alone. The President is, however, vested by the Constitution with certain duties in whose discharge he is exempt from inquiry by courts. His discharge of

48 those duties as the Constitution imposed them is in the highest sense a public use and the committal to him of means to discharge them falls into the same category. Therefore, if the President had asked of Congress the possession of property for use in his capacity, for example, as commander-in-chief, it would have been as lawful for them to entrust it to him without condition as though they appropriated money for his disbursement.

If so, there was no reason why they should not have suspended the time of possession until in his judgment it became advisable that he should acquire it. Into the occasion of his necessity they need as little inquire as though he had asked for it at once. All that was necessary was that he should ask for it in some capacity which the Constitution recognized. Furthermore, it is not necessary that the capacity should be expressly stated so long as it is apparent that the property condemned was in its nature appropriate to the exercise of some constitutional function. I must assume that when he required it, he required it by virtue of some constitutional power, so long as that might have been the case.

The question is therefore rather of the power of Congress to condemn property for the President's use within his limited powers, than of his exercise of them. The latter in any event must be exempt from impediment by individual interests before courts. If Congress have not the power obviously it cannot put into the President's hands those instruments which may be essential to the discharge of his duties except upon condition that he submit to a control from which in other respects he is exempt. That the Constitution should prescribe so unworkable a system seems to me unthinkable. Without the co-operation of Congress the President is substantially without means to exercise his prerogative. If he must justify before courts

49 any occasion he may have to accept their assistance government becomes in the final analysis not one of laws but of courts. Cases such as *Mitchell v. Harmony*, 13 How. 115 and *U. S. v. Russell*, 13 Wall. 623, are quite different. There the power depended upon the common-law, which imposed upon its exercise the condition that the emergency was actual. It became necessary to scrutinize the decision of the officer exercising the power to ascertain whether it existed.

Having such power, did Congress intend to bestow upon the President possession at his mere assertion that he wished it? Without doubt. The language of the Resolution is that he may seize the cables "whenever he shall deem it necessary"; his conclusion is the single condition. The occasion lent color to this interpretation. The war was at its height; the nation was using every energy and resource towards its effective prosecution. The President as its executive head was responsible for its success, and the purpose of concentrating in him a power commensurate with that responsibility was obvious in all contemporary legislation. That Congress should

have contemplated the possibility that he should be compelled at the suit of an individual to disclose and justify the reasons for his act is beyond possibility. He had to act quickly, certainly and without the trammels of courts or private interests.

Are there, then, constitutional powers of the President to whose discharge the possession of such property was suitable? If for the moment one considers the question if it had arisen before November 11, 1918, the answer is immediate. Cable lines leading to the theatres of war, Europe and Asia, were obviously appropriate to the conduct of military operations. I need hardly expatiate upon the

50 vital necessity of rapid communication to military success. Nor does it make the least difference whether the plaintiffs are right in saying that they were already giving as good service as could be obtained under governmental control. The single question is whether they possessed an instrument available for military use; if so, the President as commander-in-chief had the sole power to determine whether it was wiser to acquire possession or to operate it otherwise. Nor do the cables leading elsewhere introduce any difficulty. The cables were already in one system of management and under one control, and it was not essential that only those which were immediately important to actual military operations should be taken. If the operation of those immediately necessary would be facilitated by possession of all, that was enough. But indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theatre of military operations. The espionage system of the enemy we are told was not limited to belligerents—at least it may be so. Provision for supplies and material could not be made without an eye to the resulting scarcity at home and the available substitutes abroad. In a war which has called for the last resources of the belligerent powers, and where the United States was in active military co-operation with many of these belligerents, it is quite impossible to say that means of telegraphic communications anywhere in the world were not appropriate to its prosecution. If the President, who by virtue of his office was charged with the successful conduct of the war, decided that any such means were necessary, his decision was final.

The plaintiffs do not, however, take that position. They rely upon the fact that after November 11, 1918, the war was from a military aspect closed and that the powers of the President had changed. By virtue of what fact did they change? Not the 51 intent of Congress, because the resolution expressly extends the powers until peace has been declared. Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary. Nor did they change by any limitation of the Constitution that I know. Even if I were to assume that the power were only co-extensive with a state of war, state of war still existed. It is the treaty which terminates the war. The Protector, 12 Wall. 700, *Hijos v. U. S.*, 194 U. S. 315.

armistice effects nothing but a suspension of hostilities; the war still continues.\* It is true that a war may end by the cessation of hostilities, or by subjugation, but that is not the normal course, and neither had hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used. There were still military operations, the armistice had not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory and were in European and Asiatic Russia, where indeed they still remain. The President was still in command of those forces and to their conduct telegraphic communication was still essential. All that the armistice could do was to introduce a new, though very vital, consideration into his decision, but it did not affect its finality. A court might conclude that there was no basis for the seizure, but a court would have as little right to entertain the issue before as after the armistice.

There is, moreover, another constitutional power of the President, under which the seizure was justified, and which also depends upon the existence of war, his initiative in the making of treaties. War is not the release of primitive combative instincts; it is an enterprise conducted for purposes consciously understood, whose realization gives to it its only rational significance.† The national security and defense is to be judged not by the immediate present, but by the stability of the ensuing state of peace. The

\*Oppenheim, International Law, Vol. II War. Secs. 231, 233, 260-266.

Sec. 231. "Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break the blockade, and the right to seize contraband of war."

Articles 36 and 37 of the Fifth Convention at the Second Hague Conference are as follows: (translation)

"Art. 36. An armistice suspends military operations by mutual agreement of the belligerents. If its duration is not determined the belligerents may resume such operations at any time provided always that the enemy is advised within the agreed time and in conformity with the conditions of the armistice."

"Art. 37. An armistice may be general or local. The first everywhere suspends military operations between the belligerent states, the second only between certain parts of the belligerent armies and within a fixed radius."

†Oppenheim, op. cit. Sec. 54: "War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." Sec. 66. Ends of war are those objects for the realization of which a war is made. In the beginning of the war its ends are determined by its cause or causes, as already said. But these ends may undergo alteration, or at least modification, with the progress and development of the war. No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the objects for which war was made. If war has once broken out the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortunes and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war."

terms of the final conventions, the success of the nation in achieving the aims with which it set out, and which it may have adopted during the progress of war, are the measure of that security and defense. Those aims, whatever they are, are deemed essential to some vital national interest, not necessarily confined to freedom from immediate invasion. It may destroy the armed opposition of the enemy and wholly fail in securing its defense of those interests. The President is charged by his function of negotiating, for presentation to the Senate, a treaty of peace, with the duty of reducing to preliminary form the success which the arms of the nation may have made possible. His right to hold the cables for such purpose, if valid at all, certainly was not affected by the armistice.

Had the possession of the plaintiffs' cables any relation to the negotiation of peace? Obviously the possession of some telegraphic communication is essential, leading not only to the immediate place where the negotiations may go on, but to any part of the world which may be affected by, or may affect, the result. Many nations have been involved, many may intervene in the conference; no one can at the moment predict to what part of the world immediate secret and rapid communication may become a vital necessity for the success of the nation's purposes. Again, as in assistance to the conduct of war, if the cables be appropriate to a discharge of the President's constitutional duty, the number seized and the service rendered under governmental operation is not open to examination. The decision may be wrong; it may even be actuated by purposes other than those intended by Congress, but the relief is not from judgment.

The considerations which might dictate it are so obvious that 54 political in character as to preclude the possibility of their public disclosure or of their judicial determination. If possible, they are more foreign to the questions which courts may settle than those determining the propriety of the seizure of an instrument of active warfare. Whatever means are in their nature available for the successful conduct of negotiation are open to the President to use while negotiating, if Congress chooses to put them at his disposal.

It is true that if the issues were justiciable, I am not prepared to say that the allegations of the bills would not present a case. Taken favorably, as I must take them, they say that the plaintiffs have given a service which in speed, in volume, in organization and in secrecy have been all that the property is capable of giving. I take this to include either separate operation or joint control. In any event, the defect if it were strictly a defect could be supplied by amendment. It is plain that marine cables cannot be used for anything but the transmission of intelligence and such allegations seem to me unavoidably to present for determination whether a change in possession could improve the character of the service and so be necessary to the security and defense of the nation in the respect in which it could assist in that defense. If that question were open to courts at all, I cannot think of any assertions which would better serve to open it. The defendants' argument that a trial might involve political considerations improper for disclosure, or goes to the propriety of any trial at all, not to the necessary inference

from the allegations, if they be true. If true, there was no public necessity; hence the issue is well framed, if it is justiciable. I hold that it is not.

55 The remaining question is simply of the adequacy of the provisions for compensation. The allegations touching the partiality of the defendant, Burleson, are irrelevant. He will not make the preliminary estimate of the compensation due, but the President, who has not yet even deputed the defendant to advise him. Even had he done so the final decision rests with him and he cannot finally delegate it under the Joint Resolution, whatever assistance he may take. But the whole question is irrelevant in any case because of the resort given to the Court of Claims. If that be adequate, the resolution is valid. Upon that question I am concluded by the decision of the Supreme Court in *Crozier v. Krupp*, 224 U. S. 290. The language upon which the plaintiffs rely to distinguish that case does not appear to me to indicate that a similar provision here should be considered inadequate. It occurs upon page 306 and refers to the intangible nature of the property taken, its possible importance to conduct of the government and the pledge of good faith for payment. Of these the second two certainly apply in the cases at bar and the first as well, as I understand the opinion. I assume that the reason why the Chief Justice referred to the intangible character of the property taken was because it was impossible in advance to determine its value. The value of the temporary possession of the plaintiffs' cables is as difficult of ascertainment. It was necessarily uncertain when that possession would begin and how long it would continue. How great would be the damage done could be ascertained only after a calculation which could not even approximately be made in advance. Pressing necessities of the most vital nature required the power to be given and did not admit of any preliminary appropriation. The same statute was considered in *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, and its scope somewhat limited, but it is clear, page 42, that the Court meant to repeat its decision that when a public officer of the  
56 United States takes a patent right, it was by virtue of the right of eminent domain and that a resort to the Court of Claims was adequate compensation. At least in the face of those declarations it would be an obvious impropriety for a District Judge to hold otherwise.

I conclude, therefore, that the seizure was within the powers conferred by Congress, ancillary to the constitutional powers of the President, whose execution it was intended to assist, and that the Joint Resolution gave adequate compensation. Of the proposed conduct of the defendant in consolidating the cables under one management, whether or not it be in contravention of the Sherman Act, the plaintiffs are not in a position to complain.

The motions are granted and the bills will be dismissed with costs.

January 10, 1919.

L. H., D. J.

Filed Jan. 10, 1919.

57 At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, on the 15th Day of January, 1919.

Present: Honorable Learned Hand, United States District Judge.

In Equity.

Docket No. E 15/330.

THE COMMERCIAL CABLE COMPANY, Complainant,

versus

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

The defendants above-named having moved this Court, among other things, that the bill of complaint herein, as amended, be dismissed with costs to the defendants, and the said motion having come on to be heard on the 27th day of December, 1918,

Now, after hearing Edward F. McClennen, Esq., Special Assistant to the Attorney General, and Harold Harper, Esq., Assistant United States Attorney, of Counsel with the defendants, in support of said motion, and Charles E. Hughes, Esq., of Counsel with the complainant, in opposition thereto, and due deliberation having been had, on motion of Francis G. Caffey, Esq., United States Attorney, Solicitor for the defendants, it is hereby

Ordered, adjudged and decreed that the said motion be and the same hereby is granted and the said bill of complaint, as amended be and it hereby is dismissed upon the merits, and that the defendants have judgment for costs to be taxed by the Clerk of the Court.

LEARNED HAND,  
*United States District Judge.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919. Due service of a copy of the within is hereby admitted. New York, Jan. 14, 1919. William W. Cook, Attorney for Complt.



58

*(Appeal and Allowance.)*

United States District Court for the Southern District of New York.

In Equity.

THE COMMERCIAL CABLE COMPANY, Complainant,

against

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

To the Honorable Learned Hand, District Judge:

The above named complainant, feeling itself aggrieved by the decree made and entered in this cause on the 15th day of January, A. D. 1919, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed, and that a citation issue as provided by law, and that a transcript of the record of the proceedings and papers upon which said decree was based duly authenticated, may be sent to the Supreme Court of the United States, sitting in the City of Washington, in the District of Columbia,

Your petitioner further prays that the proper order touching the security required of it to procure its appeal be made.

Dated, January 15th, 1919.

WILLIAM W. COOK,

*Solicitor for Complainant.*Office & Post Office Address, 44 Wall Street, the City of New York,  
N. Y.

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The petition is granted and the appeal allowed upon giving a bond conditioned, as required by law, in the sum of \$250.

LEARNED HAND,

*Judge of the United States District Court for  
the Southern District of New York.*

On January 15, 1919, a bond in the sum of \$250.00, approved by Judge Learned Hand, U. S. District Judge, was filed in the Clerk's Office by the Appellant The Commercial Cable Company.

*(Assignment of Errors.)*

In the District Court of the United States, Southern District of New York.

In Equity.

THE COMMERCIAL CABLE COMPANY, Complainant,  
against

ALBERT S. BURLESON and NEWCOMB CARLTON, Defendants.

Now, on this, the 15th day of January, 1919, comes the complainant by its attorney William W. Cook, and says that the decree entered in the above cause on the 15th day of January, 1919, dismissing the bill, is erroneous and unjust to complainant:

1. Because the said decree dismissed the bill.
2. Because it did not hold that the bill was not against the United States.
3. Because it did not hold that the bill was not directed against the President of the United States.
4. Because it holds that the seizure of complainant's cables on November 16th, 1918, was within the powers conferred by the Joint Resolution of Congress of July 16th, 1918.
5. Because it holds that said Joint Resolution is constitutional in regard to its provision for the payment of just compensation to complainant.
6. Because it holds that the said seizure of said cable lines on November 16th, 1918, was justified by the said Joint Resolution.
- 61 7. Because it holds that the action of the President in seizing said cables on November 16th, 1918, is not justiciable and that the court has no power to question the action of the President and the necessity for the seizure of said cables on said date.
8. Because it holds that the decision of the President that the said seizure of said cables was necessary for the national security and defense cannot be reviewed by the court under any circumstances.
9. Because it holds that the power delegated by the said Joint Resolution of Congress to the President confers powers, the exercise of which cannot be reviewed by the court.
10. Because it holds that the court has no power to inquire whether there was a tenable basis for the action of the President in his said seizure of said cables.
11. Because it holds that the said Joint Resolution and the action of the President thereunder was administrative and not legislative.
12. Because it holds that the Joint Resolution put said cables at the general disposal of the President in the discharge of his constitutional functions without inquiry as to the specific purposes he might have in mind, and that the court cannot review his action in regard thereto.
13. Because it holds that the seizure of said cables by the President

62 was not limited by the terms of said Joint Resolution but gave a discretion within some capacity which the Constitution recognized.

14. Because it holds that said seizure cannot be questioned by the court if its seizure was appropriate to the exercise of some constitutional function.

15. Because it holds that said Joint Resolution and the exercise of power thereunder by the President was the same as condemnation of property by Act of Congress for the President's use.

16. Because it holds that if the court should have jurisdiction to review the action of the President herein the system of government under the Constitution would be unworkable and unthinkable.

17. Because it holds that said Joint Resolution and the exercise by the President of his power thereunder is a mere exercise of the President's prerogative under the Constitution.

18. Because it holds that if the court has power to review the action of the President the result would be government by courts and not by laws.

19. Because it holds that Congress by said Joint Resolution intended to bestow upon the President possession of said cables at his mere assertion that he wished such possession.

20. Because it holds that the language of the Joint Resolution authorizing the President to seize said cables "whenever he shall deem it necessary" made his action conclusive on the court.

21. Because it holds that Congress did not contemplate by said Joint Resolution the possibility that the President should not be free from justifying the reasons for which he seized said cables.

63 22. Because it holds that the President as Commander-in-Chief had, under said Joint Resolution, the sole power to determine whether it was wiser to seize possession of said cables or to allow them to be operated as they had been.

23. Because it holds that the seizure of the cables not immediately important to actual military operations was justified.

24. Because it holds that the decision of the President that the seizure of the cables was necessary, was final.

25. Because it holds that the war so far as the military emergency was concerned did not end nor the powers of the President change after November 11th, 1918, the date when the armistice was signed.

26. Because it holds that such a state of war still existed after November 11th, 1918, as to justify the seizure of said cables by the President.

27. Because it holds that nothing but a treaty could terminate the war, within the meaning of the words of said Joint Resolution.

28. Because it holds that the court had no more right to question the basis for the seizure after the armistice than before the armistice.

29. Because it holds that such seizure of said cables was justified under the power of the President to initiate the making of treaties.

30. Because it holds that the words "national security and defense" as used in said Joint Resolution, are to be judged by the stability of future peace.

31. Because it holds that the words "national security and defense",

64 as used in said Joint Resolution, pertain to the terms of the final Convention of peace and the success of the nation in achieving the aims for which it set out.

32. Because it holds that the President had a right to seize and hold said cables in connection with his function of negotiating for presentation to the Senate of a treaty of peace.

33. Because it holds that the seizure of the cables in connection with the negotiations for peace involve not only the cables to the place where the negotiations were going on, but cables to any part of the world.

34. Because it holds that the court cannot inquire into the necessity of taking all of the cables instead of a part of them.

35. Because it holds that even though the purposes for which the President seized said cables were not the purposes intended by Congress, and even though such purposes are obviously political in character, yet the courts cannot inquire into them.

36. Because it holds that the issues presented by the bill of complaint are not justiciable.

37. Because it holds that even though there is no public interest involved in the seizure of the cables, yet that the court has no jurisdiction to question the same.

38. Because it holds that the provisions in said Joint Resolution for compensation are constitutional and adequate.

65 39. Because it holds that the partiality of the defendant Burleson in connection with the fixing of the compensation to be paid to complainant is irrelevant.

40. Because it holds that the defendant Burleson will not make the preliminary estimate on the compensation, but that it will be made by the President.

41. Because it holds that the resort given by the Joint Resolution to the Court of Claims is adequate and constitutional.

42. Because it holds that the value of the temporary possession of complainant's cables is difficult of ascertainment and require a calculation which could not be made even approximately in advance.

43. Because it holds that a pressing necessity of the most vital nature required that power be given to the President to seize said cables, and did not admit of any preliminary appropriation.

44. Because it holds that the seizure was within the powers conferred by Congress ancillary to the constitutional powers of the President whose execution it was intended to assist.

45. Because it holds that the Joint Resolution gave adequate compensation.

46. Because it holds that the proposed conduct of the defendants in consolidating the cables under one management cannot be complained of by the complainant as in violation of the Sherman Anti-Trust Act of Congress of July 2, 1890.

47. Because it does not hold that within the letter, purpose and spirit of said Joint Resolution the duration of the war ceased when an armistice was signed suspending hostilities, so far as the seizing and control of said cables was concerned.

66 48. Because it does not hold that the seizure of complainant's cables was unconstitutional, unauthorized, ultra vires, illegal and void.

49. Because it does not hold that the war, within the meaning of said Joint Resolution, had terminated prior to the time of said seizure.

50. Because it does not hold that Congress had no power or authority under the Constitution to authorize the taking possession and control and operation of said cable system under the circumstances existing at the time of said seizure.

51. Because it does not hold that said seizure was not reasonably necessary for the national security and defense.

52. Because it does not hold that said seizure deprived complainant of its property without due process of law.

53. Because it does not hold that said seizure took complainant's private property for public use without just compensation to complainant.

54. Because it does not hold that said seizure was an unreasonable and arbitrary seizure.

55. Because it does not hold that said seizure was not for public use.

56. Because it does not hold that no proper and legal provision had been made for the payment of compensation to your complainant, and that complainant was not even authorized to retain its regular profits of its own property.

57. Because it does not hold that the national security and defense within the meaning of the Joint Resolution was fully attained by the signing of said armistice and by the discontinuance of  
67 hostilities under the present war.

58. Because it does not hold that the seizure of said cables on the ground that they were necessary for the national security and defense was a mere pretext without substance or basis of fact whatsoever.

59. Because it does not hold that the seizure of complainant's future income, as well as its physical properties, namely, said cables, deprives complainant of its income, moneys and profits without due process of law, and takes complainant's private property for public use without just compensation.

60. Because it does not hold that the defendant Burleson claims the right to take your complainant's daily profits and return a small part thereof to complainant, and keep the remainder in violation of the Constitution of the United States.

61. Because it does not hold that the defendant Burleson, in fixing the compensation to be paid for the use of said properties proceeds on a fundamentally wrong principle, namely, that he should pay merely 6% on an arbitrarily fixed physical value of the property without any allowance for earning power and without any correct method even of arriving at said appraised value, and that this is the taking of property without due process of law and without proper compensation being made or provided for.

62. Because it does not hold that the power to fix compensation has been illegally delegated.

63. Because it does not hold that the defendant's purpose and intent to intermingle, unite, consolidate and merge complainant's business, good will, staff, organization, employees, plants and  
68 equipment with that of its competitor, the Western Union Telegraph Company, so that the separate identity, business and good will of complainant will disappear, so that complainant may be forced or persuaded to abandon competition hereafter, and acquiesce in defendant's plans for government ownership of the same, or an amalgamation of all the cables in the Atlantic Ocean, is material and constitutes a cause of action.

64. Because it does not hold that the seizure of said cables, involving cable landings on shores of foreign countries and jeopardizing, according to the allegations of the bill of complaint, complainant's cables, cable landings and relations with foreign governments, furnishes a basis for this bill.

Wherefore, complainant prays that the said decree be reversed, and that the District Court be directed to decree that the bill of complaint should not be dismissed, and that the Supreme Court of the United States shall reverse and render a proper decree on the record, etc.

WILLIAM W. COOK,  
*Solicitor for Complainant.*

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, City of New York, N. Y.

(Endorsed:) A copy of the within paper has been this day received at this office. Jan. 15, 1919. Francis G. Caffey, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919.

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*(Citation on Appeal.)*

UNITED STATES OF AMERICA, ss:

To Albert S. Burleson and Newcomb Carlton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 3rd day of February, nineteen hundred and nineteen, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein The Commercial Cable Company is appellant and Albert S. Burleson and Newcomb Carlton are respondents, to show cause, if any there be, why the decree in said appeal should not be corrected and speedy justice should not be done to the parties on that behalf.



Witness the Hon. Edward Douglass White, Chief Justice of the United States, this 15th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal District Court of the United States, Southern District of N. Y.]

LEARNED HAND,  
*Judge of the District Court of the United States  
for the Southern District of New York.*

70 [Endorsed:] Original. Docket No. E. 15-330. In Equity.  
In the District Court of the United States, Southern District of New York. The Commercial Cable Company, Complainant, against Albert S. Burlison and Newcomb Carlton, Defendants. Citation on Appeal. William W. Cook, Solicitor for complainant, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office Jan. 15, 1919. Francis G. Caffey, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Jan. 15, 1919.

71 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

THE COMMERCIAL CABLE COMPANY, Complainant-Appellant,

vs.

ALBERT S. BURLISON and NEWCOMB CARLTON, Defendants-Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 16th day of January, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-third.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Clerk's fee for certifying record \$18.50.

ALEX GILCHRIST, JR., *Clerk.*

[Endorsed:] United States Supreme Court. The Commercial Cable Company, Complainant, Appellant, vs. Albert S. Burleson and Newcomb Carlton, Defendants-Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 26,901. S. New York D. C. U. S. Term No. 815. The Commercial Cable Company, Appellant, vs. Albert S. Burleson and Newcomb Carlton. Filed January 20th, 1919. File No. 26,901.